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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 1036

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, G. N. TIDD, E. P. SUMMERSON, H. L. ALLER, J. R. HOBBINS, ELECTRIC BOND AND SHARE COMPANY and EBASCO SERVICES INCORPORATED,
Petitioners,

and

S. R. INCH, A. S. GRENIER, C. F. KELLEY, S. A. MITCHELL, P. B. SAWYER, E. B. TRACY, H. T. WHITE, W. R. KENAN, W. V. GRIFFIN, L. H. PARKHURST, W. D. THORNTON, E. ERICSON, F. R. BAUER, J. W. FROST, D. W. JACK, NEBRASKA POWER COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, NORTHERN POWER COMPANY, NORTHWESTERN ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, INLAND POWER & LIGHT COMPANY, PORTLAND GAS & COKE COMPANY, SUPERIOR WATER, LIGHT AND POWER COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY, TEXAS PUBLIC UTILITIES CORPORATION, THE WASHINGTON WATER POWER COMPANY, AMERICAN POWER & LIGHT COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, FLORIDA POWER & LIGHT COMPANY, KANSAS GAS AND ELECTRIC COMPANY and THE MINNESOTA POWER COMPANY,
Defendants,

v.

DORA GOLDSTEIN,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN F. MACLANE,
LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
Counsel for Petitioners.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This reply brief is submitted because the respondent's counsel misconceives the issues both in the case at bar and in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), and the scope and effect of the decision in the latter case.

This suit is not one to obtain redress for wrongs practiced by a controlling company upon its subsidiary, or for the enforcement of remedial legislation enacted to remedy such wrongs. The cause of action stated in the complaint now before the Court is one solely to recover a penalty imposed by statute to enforce acceptance of its obligations. The penalty has no relation to standards of conduct elsewhere prescribed in the statute, and is lifted by the formula of compliance. No cause of action is stated in the complaint based upon abuse of parent-subsidiary relationships (excess of charges over value of service or other improper practice), and the causes of action for violation of statutory standards (excess of charges over cost) were withdrawn (Petitioner's Brief, p. 6). Such causes of action are treated in respondent's brief, and in the opinion of the Court below, in effect, as still before the Court.

The Electric Bond and Share Company test case determined only that the penalty was valid and could be enforced if the defendants therein refused to signify their acceptance of the statute. The decree did not hold the contracts here in question void, nor was their validity in any way in issue. It merely invoked the penalty of deprivation of the right to use the mails and instrumentalities of commerce until the defendants registered and thus signified their acceptance of the statute (Record in Electric Bond and Share Company case, Vol. VIII, pp. 21-61, 62-65). Further, the decree by its terms postponed the effective date of the penalty until thirty days after the date of the decree, or, if appeal should be taken, thirty days after the filing of mandate from the Appellate Court in the District Court.

As stated in petitioner's brief (pp. 10-12; Appendix, pp. 43-48), the issues presented here as to the application

of Section 26(b) of the Public Utility Holding Company Act to activities prohibited by Section 4(a) of the Act were decided adversely to the contentions here made by respondent. Suing derivatively as a stockholder of a defendant in that case respondent is bound by that decision. In this respect the decision of the Court below is in direct conflict with the findings and conclusions in that case.

The decision of this Court in the test case made no findings as to the validity of the contracts in question, and discussed their performance as involving the use of the mails and instrumentalities of commerce, together with other activities of petitioner and its associated companies, such as sales of electricity and securities, solely from the viewpoint of establishing the power of the Federal Government to regulate these activities, by denying the use of the mails and instrumentalities of commerce unless these companies should register under the Act, and furnish the information as to their activities required in the act of registration. 303 U. S. 419, 431-433. The quotation from page 440 of the opinion on page 10 of respondent's brief is lifted from its context and gives an entirely erroneous impression as to this Court's decision.

In view of the foregoing, there is no warrant for the statements in respondent's brief (pp. 3-4, 10) that the test case was brought to enjoin performance of the service contracts, or (p. 4) that this Court there held that such contracts violated Section 4 of the Act.

Respondent's analysis of the terms of the stipulation of the parties in the test case (Respondent's Brief, pp. 17-21) ignores its essential purpose, which was to secure an orderly determination of issues of great public importance without the confusion which would have resulted from involving one of the major industries of the Country in chaos pend-

ing such determination, its interpretation by the chief law officers of the Government, and its acceptance by the Courts as basis for their decisions as discussed in petitioner's brief (pp. 8-12; Appendix, pp. 39-51). The question presented is not one of narrow textual construction divorced from context and the action of the parties and the Courts based thereon, but of its true intent and meaning and practical effect as embodied in judicial decrees. This question is directly and completely presented by this record, and the decree, while interlocutory in form, is dispositive thereof (Petitioner's Brief, p. 6).

The questions of law discussed in respondent's brief (pp. 9-17) are sufficiently discussed in petitioner's brief with respect to this matter.

Respectfully submitted,

JOHN F. MACLANE,
LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
Counsel for Petitioners.

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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1944

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, ET AL., PETITIONERS

v.

DORA GOLDSTEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 101

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MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICI CURIAE

Neither the United States nor the Securities and Exchange Commission has participated in any way in this case in the lower courts, and we do not desire to take any position in this Court on the merits of any of the issues raised by the petition for a writ of certiorari. However, the controversy between the petitioners and the respondent revolves in large part around the meaning and legal effect of certain statements made by the Government as to its position in the litigation

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which culminated in this Court's decision in *Electric Bond and Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419 (hereinafter referred to as the *Bond and Share* case); and we believe that we may be helpful to the Court in resolving this controversy by calling the Court's attention to additional statements, not cited in the petition or the brief in opposition, which were made with respect to the Government's position and which are part of the public record in the *Bond and Share* case or in cognate litigation likewise involving the constitutionality of the Public Utility Holding Company Act of 1935. We wish also to point out to the Court certain considerations of public policy which we believe call for prompt determination of all the basic issues involved in this proceeding.

I

THE GOVERNMENT'S POSITION IN THE BOND AND SHARE LITIGATION

As indicated in the petition for a writ of certiorari, various officials of the Government, in anticipation of litigation as to the constitutional validity of the Public Utility Holding Company Act, made public announcements as to the position of the Government with respect to the enforcement of the Act pending determination of the constitutionality of its registration provisions. These announcements, made by the Attorney General, the

Postmaster General, and the Securities and Exchange Commission, were incorporated in the stipulation of facts entered into as a basis for the trial of the *Bond and Share* case, which had been selected by the Government as a constitutional test case. In the instant petition for a writ of certiorari the petitioners rely upon these announcements, and the stipulation of facts in the *Bond and Share* case, as a bar to the maintenance of the present private action to recover payments allegedly made in violation of the Act during the period between its effective date and April 1, 1938, the date of Bond and Share's registration following this Court's opinion affirming the constitutionality of the registration provisions (303 U. S. 419, decided March 28, 1938). Of the announcements and the stipulation the petitioners state (Pet. 10):

> Placing full faith in and reliance upon these declarations and the stipulation the defendants, including Electric Bond and Share Company, Ebasco Services Incorporated and American Power & Light Company, continued the conduct of their business pending the outcome of the case. Reciprocally, defendants refrained from instituting a multiplicity of suits, securing preliminary injunctions or otherwise creating procedural embarrassments (see p. 15, *infra*).

In their briefs and arguments before the District Court, the Circuit Court of Appeals and the Supreme Court, the Government,

> through its counsel, took the position that the defendants were immune from the consequences, including those imposed by Section 26, of violations of the Act until final determination by the Supreme Court (Appendix, p. 50). * * *

The respondent disputes petitioners' interpretation of these statements of the Government's position (Br. 17–21), contending that whatever effect the statements might have had with respect to the institution of governmental action, they did not purport to, and could not, protect petitioners from the eventuality of private suit. This interpretation was accepted by the circuit court of appeals. We express no view on the merits of this dispute, but for the assistance of the Court we set forth at length various other statements with regard to the Government's position made in the record and briefs in the *Bond and Share* litigation, and in the briefs in this Court in *Burco, Inc.* v. *Whitworth, et al.,* Nos. 834 and 835, October Term, 1935, certiorari denied, 297 U. S. 724, and *Landis* v. *North American Company,* 299 U. S. 248, two earlier cases in this Court arising out of the same constitutional controversy as was involved in the *Bond and Share* case. We believe that these additional statements will serve to illuminate the position taken by the Government in the *Bond and Share* litigation, and to aid the Court in determining the legal effect of that position.

1. Excerpt from Statement of the United States of America as *Amicus Curiae* filed in *Burco, Inc.*

v. *Whitworth*, Nos. 834 and 835, October Term, 1935, certiorari denied, 297 U. S. 724:[1]

(c) *Steps taken by the Government to ensure preservation of the rights of companies subject to the Act during the pendency of the Electric Bond and Share test cases.*—To ensure preservation of the rights of companies subject to the Act during the pendency of the Electric Bond and Share test cases, the Government has taken action in three directions. As a first step—taken before any suits were brought to enjoin the enforcement of the Act—the Securities and Exchange Commission issued regulations expressly permitting a holding company when registering to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be judged invalid or ineffective.[20]

[20] As stated in the Petition for certiorari, the Circuit Court of Appeals for the Fourth Circuit, on the same day on which the decision in the instant proceeding was rendered, in *Public Utility Investing Corporation, et al.*, v. *Utilities Power & Light Corporation* (not yet officially reported), denied an application for a temporary restraining order pending an appeal from an order dismissing a stockholder's bill to enjoin a corporation from registering under the Act, stating in its opinion that the plaintiffs were "clearly not entitled to injunction in the absence of a reasonable ground to apprehend irreparable injury; and we see no reason to apprehend irreparable injury in the light of the permission given to register with reservation of constitutional rights."

[1] The excerpt set forth in the text appears at pp. 52–54 of the Statement. The litigation is that referred to at pp. 8–9

As a second step—taken before any suits were brought to enjoin the enforcement of the Act—the Attorney General and the Securities and Exchange Commission announced that the Commission would take the initiative to test the Act in a civil suit, that until the validity of the Act had been determined by this Court in such a civil suit neither the Attorney General nor the Commission would seek to enforce the criminal penalties of the Act, and that even after such determination they would not seek to exact penalties for earlier offenses. As a third step, the Postmaster General announced that even if he had the authority, he would not exclude any company from use of the mails because of any violation of the Act pending the judicial determination of its validity by this Court.

This procedure of the Government safeguards holding companies subject to the Act from the application to them of any unconstitutional provisions of the Act during the pendency of the Bond and Share litigation. Nevertheless the forty-six bills in equity referred to in the Petition for cer-

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of the petition in the instant proceeding. The Government was not a party to the litigation, but had appeared in the lower courts as *amicus curiae* to suggest the impropriety of using the particular litigation as a vehicle to test the constitutionality of the Act, and in its Statement as *amicus curiae* in this Court reiterated the suggestion as a basis for urging that the petition for a writ, which sought a constitutional test in this Court, should be denied even though its issuance was not opposed by any of the respondents thereto.

tiorari have been filed to restrain enforcement of the Act, virtually simultaneously, in a diversity of courts, and in a manner well calculated to cause the Government maximum physical difficulty. The Government agrees with Petitioner that such bills are without equity. But the Government disagrees with Petitioner's conclusion that the questions raised by those suits require in the public interest a review of the constitutionality of the Act in this proceeding. As stated, the Petition for an unexplained reason does not mention the availability of the Bond and Share suits to settle such questions. During the pendency of the Bond and Share suits, holding companies are protected; the suits, far broader in their coverage of the problems of the industry than this restricted proceeding, will offer a truly adequate case to test the constitutionality of the Act in a proceeding in which the Government has had an opportunity to share and in which the Act is applied to the kind of typical holding company situations which Congress had in mind at its enactment.

2. Statements in the briefs before this Court in *Landis* v. *North American Company*, 299 U. S. 248.[2]

[2] This case, like *Burco, Inc.* v. *Whitworth*, *supra*, involved an attempt to secure an adjudication as to the constitutionality of the Act in advance of determination of the *Bond and Share* case. The issue in this Court was the propriety of a lower court order, entered on motion of the Government,

(a) Excerpt from brief for the respondents (pp. 37–40):

> The acts and activities which are prohibited to unregistered companies by the Act (Section 4 (a)) are stated in a footnote. [Footnote omitted.] A reading of these prohibitions is enough to show that, if they are observed, they will make impossible the carrying on of a normal and profitable business by any holding company, in spite of the fact that many of them are in form prohibitions merely against doing the specified acts by the use of the mails or the instrumentalities of interstate commerce. And it is equally clear that, if these prohibitions are ignored, the cloud which will be cast on the legality of the contracts and other acts of such a company will paralyze its business to practically an equal extent. THAT THIS WAS BOTH THE INTENTION OF THE FRAMERS OF THE ACT AND THE EXPECTATION OF THOSE NOW ADMINISTERING IT IS CLEARLY SHOWN BY THE STATEMENT OF THE DEFENDANT LANDIS, CHAIRMAN OF THE COMMISSION, IN A PRESS RELEASE OF NOVEMBER 7, 1935, IN WHICH HE ASSERTED THAT "unless a holding company registers, the validity of any issue of securities which it may offer and of all acquisitions of property and of contracts made by it would be

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restraining further prosecution of the action (and of other similar actions instituted in the same court) pending final disposition of the *Bond and Share* case.

in question, at least until a *final* decision upon the issue of constitutionality was handed down by the Supreme Court."*

* * * * *

Until therefore the plaintiffs obtain a decree declaring the Act to be unconstitutional as against them, the validity of most of their corporate relationships and of practically every transaction or activity in which they normally engage will be subject to doubt and question. As the defendant Landis has himself suggested, what banker would undertake to sell, by public offering, an issue of their securities, until this stigma of illegality is removed by a *final* decision that the Act is void as applied to them? What must be the effect of that stigma upon *any* effort by them to negotiate a major or long-term contract, or to refund any of their outstanding securities or obligations?

For these reasons, it is clear that the Act, as is fully alleged in the bill of each plaintiff, constitutes a present and substantial cloud and encumbrance on its title to its investments, a present and substantial impairment of its freedom of contract, and a present impairment of its credit and of the value of its securities and other property. (See R. 6–22; AWW. R. 6–22.)

*The New York Times, page 1, November 8, 1935.

(b) Excerpt from the Government's brief (pp. 80–82):

In their answer to the petition for writs of certiorari in the present cases (p. 14), respondents contend that "until the Act is

finally declared to be unconstitutional as against these respondents [assuming it to be unconstitutional, as their bills allege], the cloud which its existence on the statute books will cast on the validity of practically every important act done by them in their essential corporate activities will practically paralyze the normal conduct of their business." But apart from any action or threat of action on the part of the petitioners which would be effectively stayed by an interlocutory decree, any cloud of illegality upon respondents' businesses springs not from any acts or threats or color of authority of the petitioners but from the Act itself. But respondents have brought their suits against the petitioners, not against the Act. If a cloud of illegality exists, it springs from section 26, which merely enacts the common law rule, making void as regards third persons contracts made in violation of law. And neither a permanent nor a temporary decree of the District Court against the petitioners can protect respondents against the rights of third persons not parties to the proceeding. The petitioners have no power either to enforce or to abrogate section 26; and the suits brought by the respondents against petitioners cannot remove a cloud which petitioners have neither created nor have the power to remove.

It is clear, therefore, that in so far as any permanent decree of the District Court in a proceeding against the petitioners could

protect respondents, respondents can obtain that same protection from an interlocutory decree having like force and effect during its pendency.[23] So far as future effectiveness is concerned, a permanent decree of the District Court no less than an interlocutory decree would have to yield to the law as subsequently declared by this Court in other cases (see pp. 72–77, *supra*).

[23] As was pointed out to the trial court and the Court of Appeals, if respondents' suits proceeded to trial and if respondents failed to establish any action or threat of action on the part of the petitioners against the respondents, the very serious question would arise whether there was any case or controversy between the respondents and the petitioners on which the jurisdiction of the court to render a permanent decree could be predicated. *Ex parte La Prade*, 289 U. S. 444; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *Ashwander* v. *Tennessee Valley Authority et al.*, 297 U. S. 288. This very question will be presented to this Court when this Court comes to consider the cross-bill in the Bond and Share suits.

3. Statements in the pleadings in the *Bond and Share* case.

The Bond and Share companies as cross-plaintiffs[3] cited Section 26 (b) of the Act as a threat

[3] The Government's suit was to enjoin Bond and Share and its principal subsidiary holding companies from continuing, unless they should register, the various activities which Section 4 (a) of the Act makes unlawful for an unregistered holding company. The cross-bill of the defendants sought an injunction against enforcement of, and a declaratory judgment as to the constitutionality of, the various regulatory provisions of the Act which are applicable by their terms only to registered holding companies and their subsidiaries. The problem of Section 26 (b), mentioned in the text, was

to their contracts (R. 157–162) and further alleged that whether or not the Act might be enforced by the imposition of either civil or criminal penalties "the existence of the provisions of such Act on the statute books * * * constitutes an immediate, present and irreparable threat, damage and injury to defendants' property, and causes an immediate impairment, of the value of said property and of defendants' businesses and casts a cloud on defendants' title to such property, and questions the validity of substantially every act and contract of defendants until the invalidity of such Act shall be judicially declared * * *" (R. 187).

The Government's reply to the cross-bill denied that the Bond and Share companies were subjected to any damage, irreparable or otherwise, by reason of any action or threat of action on the part of the cross-defendants (R. 221); alleged that the disposition of the issues raised by the Government's complaint would necessarily dispose of all issues raised as to the constitutionality of Sections 4, 26, and 29, being the only sections applicable to the defendants as non-registered companies (R. 221–222); and denied that the governmental authorities "have taken any action

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adverted to only in connection with the arguments as to whether it was necessary, or within the court's jurisdiction, to decide any of the issues raised by the cross-bill. Record citations in this section of the text refer to the printed record in the *Bond and Share* case in this Court, No. 636, October Term, 1937.

or have any authority to take any action under Section 26 (b) of the Act or that any decree of this Court against them or any of them can relieve the defendants of any inconvenience or damage alleged to be sustained because of the existence of such provision of the Act" or that "any of the defendants are or will be exposed to any damage, irreparable or otherwise, by their failure to comply with the provisions of Section 4 of the Act by reason of any acts or threats of the plaintiff or cross-defendants or otherwise before the validity of such provision is adjudicated by the Supreme Court of the United States" (R. 243).

4. Statements in the district court brief of the Government in the *Bond and Share* case.

The Government in the district court in the *Bond and Share* case filed three main briefs, devoted, respectively, to the facts, the scope of the issues, and the constitutionality of the registration provisions of the Act. In the brief on the scope of the issues, under the heading "THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE CROSS-BILL," there appear, at pp. 44–46, 47–48, 50–52, the following statements:

> A. THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE CROSS-BILL FOR THE PURPOSE OF DETERMINING THE VALIDITY OF THE PROVISIONS OF THE ACT APPLICABLE TO NON-REGISTERED HOLDING COMPANIES, BECAUSE THE DEFENDANTS IN THEIR DEFENSE TO THE PLAINTIFF'S BILL ALREADY HAVE AN ADEQUATE REMEDY AGAINST SUCH PROVISIONS.
>
> * * * * *
>
> The only provisions of the Act which are applicable to non-registered companies,

and, indeed, the only provisions which defendants themselves allege presently affect them as *non-registered* companies, are sections 4, 26, and 29. Section 4 (a) makes it unlawful for non-registered holding companies to use the mails or channels of interstate commerce for certain designated purposes. The enforcement of section 4 (a) is the express and exclusive purpose of the plaintiff's bill, and every possible issue thereunder is and will be raised and settled by the bill and answer.[15] Section 26 merely enunciates the common-law rule that contracts made in violation of law shall be void. That provision can have effect only as between defendants and third persons; it is not enforcible by the Commission or any other Government body or official. No action or omission by the Commission or any cross-defendant can relieve the defendants from the effects of section 26, and no decree of this Court against the Commission or any cross-defendant can bind third persons not parties to this proceeding.

Section 29 provides criminal penalties for violations of the Act; and it is true that a final judicial determination that defendants have violated section 4 (a) would technically subject them to penalties under section 29.[16] As a practical matter, however, defendants stand in no danger of

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[15] As to section 4 (b), see p. 6 n., *supra*.

[16] The plaintiff Commission has no authority to enforce criminal penalties or to bring any criminal proceedings. Section 18 (f) authorizes such proceedings to be brought solely by the Attorney Gen-

incurring any penalty for violations of section 4 except such violations as they may commit *after* the Supreme Court has finally determined the registration provisions valid. In official and public statements, the Securities and Exchange Commission, the Attorney General, and the Postmaster General disclaimed any intention, unless and until the constitutionality of the Act has been established by the Supreme Court, to enforce the civil or criminal penalties of the Act or to close the mails to violators, or thereafter to seek penalties for earlier offenses (S. 640–650). In their reply plaintiff and cross-defendants affirm such earlier announced policy and disclaimer (S. 220–227). And the stipulation states in unequivocal terms that the defendants have not been threatened by the plaintiff or any cross-defendant with any action other than plaintiff's bill in this suit in equity to compel compliance with the registration provisions of the Act (S. 271–275).

* * * If the defendants are sustained in their defense to the bill that they are not legally obliged to register, they will not only be free of the prohibitions of section 4, but they will not be subject to any penal-

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eral but only after evidence of violation has been transmitted to him by the Commission. The Commission has not transmitted and is not threatening to transmit any such evidence to the Attorney General, and even the actual transmission of such evidence by the Commission could not be questioned and brought into controversy by the defendants before the Attorney General attempted to move against them. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

ties under section 29 for failure to register, and none of their contracts will be void under section 26. If on the other hand the provisions of section 4 are found valid in their application to the defendants in this proceeding, this Court will thereby have established that the defendants have no ground to complain of any liability to which they may thereafter be exposed under section 26 or section 29 by reason of their failure to register. The plaintiff has moved to resolve these questions in the manner least calculated to injure the defendants in the event that this Court determines that the defendants must comply with the registration provisions. And when this Court has determined the issues so raised by the bill, all such questions will necessarily be *res adjudicata* as between the parties. The cross-bill, therefore, in so far as it seeks to contest the validity of sections 4, 26, and 29—the only provisions of the Act which are in fact, or which defendants claim to be, applicable to them as non-registered holding companies—is unnecessary and must be dismissed.

B. THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN DEFENDANTS' CROSS-BILL FOR THE PURPOSE OF DETERMINING THE VALIDITY OF PROVISIONS OF THE ACT APPLICABLE SOLELY TO REGISTERED HOLDING COMPANIES, BECAUSE SUCH DETERMINATION WOULD BE AN ADVISORY OPINION AS TO THE RIGHTS AND DUTIES OF THE DEFENDANTS UNDER HYPOTHETICAL CIRCUMSTANCES

Defendants' cross-bill, in so far as it relates to provisions of the Act applicable

solely to registered companies, does not seek an adjudication of present rights, but is brought to obtain an advisory opinion as to defendants' general rights and duties in relation to the Act in the event that at some future time they register under the Act and thereafter—under circumstances not presently defined—come into contact with the provisions of the Act applicable to registered companies. This Court has no jurisdiction to render such an advisory opinion.

* * * * *

The defendants in the stipulation have clearly set forth that they deliberately refrained from registration because their counsel had advised them that registration "would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights" (S. 268). Defendants, by retaining this "status of a non-registered holding company," deliberately shielded themselves and their subsidiaries from any controversy which might involve the application and enforcement of the provisions of the Act relating solely to registered holding companies or their subsidiaries. By their action, or rather non-action, defendants have made it possible for themselves and their subsidiaries to sell securities, to

make acquisitions, to perform service, sales, and construction contracts, to make upstream loans, to engage in other intra-system transactions, and to keep their accounts in any manner they see fit, without running afoul of the provisions of sections 6, 7, 8, 9, 10, 11, 12, 13, 14, or 15, and without fear of the taint of illegality which the common law and section 26 might otherwise cast upon such transactions. By their action, or rather non-action, defendants have made it impossible for the Commission or any government official to proceed against them or their subsidiaries to enforce, or to penalize them for violating, any provision of the Act applicable solely to registered companies and subsidiaries of registered companies. So long as the defendants retain their "status of non-registered holding companies," they stand in no fear of the provisions of the Act which relate only to registered companies. Until they actually become registered companies, and until they actually contemplate a particular course of conduct which is proscribed or circumscribed by a provision of the Act applicable to them, the defendants present to this Court no controversy regarding any such provision of the Act. The only controversy presently before this Court involves the right of the defendants to continue in their status as non-registered holding companies.

5. Statements in the circuit court of appeals brief of the Government in the *Bond and Share* case.

The treatment accorded in the Government's brief in the circuit court of appeals to the impact of Section 26 on the rights of the members of the Bond and Share system is essentially similar to that reflected in the above excerpt from the district court brief, and therefore no extensive quotation is necessary. In the circuit court brief the development of Proposition A is somewhat abbreviated, and the discussion of Section 26 in relation to that Proposition is relegated to a footnote (n. 26, pp. 68–70). This footnote, substantially following the language quoted above from the district court brief, contains the statement: "No action or omission by the Commission or any cross-defendant can relieve the defendants from the effects of section 26, and no decree of the District Court, or any other court, against the Commission or any cross-defendant could bind third persons not parties to the proceeding." The discussion of Proposition B is less abbreviated. As did the district court brief, the circuit court brief contains, at p. 74, language substantially identical with that which the instant petition, at pp. 10–11, quotes from the Government's brief in this Court.

6. Statements in the Supreme Court brief of the Government in the *Bond and Share* case.

The contentions of the Bond and Share companies as to the necessity of a judicial ruling on the issues raised by their cross-bill had somewhat narrowed

by the time the case reached this Court, and, accordingly, the Government's Supreme Court brief contains no discussion, similar to the excerpts quoted above from the district court and circuit court of appeals briefs, with respect to the impact of Section 26 upon transactions which might be in violation of Section 4 or Section 5 of the Act. Nor have we found in the Supreme Court brief any references to Section 26 other than the passage quoted by the petitioners at pp. 10–11 of the instant petition. However, it may be helpful to note that this passage appears in approximately the same setting as do the similar passages in the briefs in the lower courts. It is taken from Part III of the brief, which is entitled "THE CROSS-BILL WAS PROPERLY DISMISSED." The introductory portion of the discussion adverts to the lack of necessity of considering Sections 4 and 5 of the Act in connection with the cross-bill, and includes the following statements (p. 205):

> * * * As stated in the opinion of the Circuit Court of Appeals, "the cross-bill is concerned only with provisions of the Act which deal with registered holding companies since the bill and answer provide ample opportunity to decide the issues presented by § 4 (a) and § 5 of the registration sections" (R. 2332).
>
> * * * For unless defendants are obliged to register, they could never have even hypothetical concern with the rest of the Act,

since it relates solely to *registered* companies. And defendants so admit (brief, p. 112).

Proposition I under Part III is headed "I. THE CROSS-BILL PRESENTED NO CASE OR CONTROVERSY BUT SOUGHT ONLY AN ADVISORY OPINION ON HYPOTHETICAL FACTS." The passage cited by the petitioners herein appears under this heading, and with portions of its context (pp. 207–209) reads as follows:

> * * * These defendants are not registered companies. But even if defendants were registered, they have set forth neither in their cross-bill nor in the stipulation any specific transaction or course of conduct which is proscribed, controlled, or limited by any provision of the Act applicable to registered companies.
>
> * * * * * *
>
> * * * Defendants in the stipulation clearly set forth that they deliberately refrained from registration because their counsel had advised them that registration *"would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights"* (R. 268).
>
> If defendants believe that the registration provisions of the Act are unconstitutional, it is their privilege—and they have exercised it—to refrain from voluntary compliance. By their decision defendants have

made it possible for themselves and their subsidiaries to sell securities, to acquire securities and utility assets, to perform service, sales, and construction contracts, to make "up-stream loans," to engage in other intra-system transactions, and to keep their accounts in any manner which they see fit without running afoul of the provisions of sections 6 to 15, and without fear of the taint of illegality which section 26 might otherwise cast upon such transactions. But, having deliberately chosen to insulate themselves for a substantial period of time from the application of the very provisions of the Act which they now seek to attack in their cross-bill, surely defendants cannot be heard to complain if the result has also been to prevent any justiciable controversy over such provisions from arising.

Because the District Court could find no present controversy over any section of the Act other than the registration provisions, the Court was obliged to and did find as a fact that it could not "presently determine in what manner and to what extent and in what circumstances, if ever, any such provision of the Act or rule, regulation, or order thereunder will become applicable to any such defendant" (R. 2251, finding 67). * * *.

II

THE PUBLIC IMPORTANCE OF EXPEDITIOUS DETERMINATION OF THE ISSUES

We express no view with respect to the correctness of the decision of the court below on the

issues of law which that court undertook to determine, nor with respect to the conflicting assertions of the petitioners and the respondent as to whether the issues are of sufficient importance or novelty to justify review by this Court. However, we believe that in considering the petition for a writ the Court may properly take into account the impact of this action upon the statutory duty of the Securities and Exchange Commission to bring the Bond and Share system into conformity with the requirements of Section 11 (b) of the Public Utility Holding Company Act. Until the issues involved in this action are finally disposed of, it will be difficult for the Commission to discharge fully its responsibilities under Section 11 (b) with regard to the Bond and Share system.

Basic to any satisfactory plan of recapitalization, liquidation or other reorganization designed to accomplish the objectives of Section 11 (b) is a determination of the relative rights of the top holding company and the public security holders of its subsidiaries. This action places in issue those relative rights as regards the public security holders of American Power & Light Company, one of Bond and Share's principal public utility holding company subsidiaries. In itself the action thus directly affects a substantial portion of the Bond and Share system. But its impact is not limited to its direct effect; as the court below said in its opinion (142 F. (2d) 422, at p. 425): "Com-

panion cases which by stipulation of the parties await the outcome of this appeal concern other intermediate holding companies and their operating subsidiaries, so that, as it appears, substantially all the companies in the Bond and Share System are involved directly or indirectly in this litigation."[4]

From the presentation to this Court of the original *Bond and Share* case, the Court is undoubtedly familiar with the nature and extent of the Bond and Share system. Bond and Share is the largest of the registered holding company systems, with a vast number of public security holders and alone accounting for approximately 17% of the industry.[5] The size and complexity of the Bond and Share system make the application to it of Section 11 (b) of the Public Utility Holding Company Act an administrative task of major importance. In the Commission's approach to that

[4] We do not understand that the issues involved in this litigation apply to American Gas and Electric Company, one of the five major subsidiary holding companies of Bond and Share, since that company had its own servicing arrangements for its subsidiaries and did not receive services from Ebasco. The petition states (p. 7) that the relationships of American Gas and Electric Company to Bond and Share "are different and it is in no way involved in the present problem."

[5] At the time of the original *Bond and Share* litigation the system handled approximately 17% of the electric energy generated in the United States. See Appendix B to the Government's brief in this Court in the *Bond and Share* case, No. 636, October Term, 1935, at p. 41.

problem, one of the focal points has been the status of the various subsidiary holding companies in which Bond and Share has a minority but controlling interest. Orders of the Commission requiring the dissolution of two of these subsidiary holding companies, American Power & Light Company and Electric Power & Light Corporation, have been affirmed by the United States Circuit Court of Appeals for the First Circuit and are the subject of pending petitions for writs of certiorari (Nos. 166, 167, this Term). American Power & Light Company has substantial arrears of preferred stock dividends and while contesting the dissolution order has conceded the desirability of a substantial reorganization. It has filed with the Commission for its approval a program which involves the discharge of American's indebtedness and the substitution of a single class of stock for the existing common and preferred stocks. The Commission has consolidated this filing with the dissolution proceedings, and has considered it as raising the same questions as to the respective interests of various classes of security holders in the assets of American as would be raised by a plan to comply with the dissolution order. Similar action on the part of Electric Power & Light Corporation may ultimately be expected in the absence of reversal of the dissolution order. In the case of National Power & Light Company, another subsidiary holding company, no review has

been sought of an order requiring its dissolution,[6] and substantial progress has been made toward such dissolution. In the case of American & Foreign Power Company, Inc., a fourth sub-holding company, the Commission has issued a notice and order for hearing raising the question whether that company must be reorganized in order to conform with the standards of Section 11 (b) (2) of the Act.[7]

It is true that a determination of the respective rights of Bond and Share and the public security holders of its subsidiaries, for the purpose of passing upon any plan of reorganization, may well require a review of the entire course of intercompany relationships since the organization of the subsidiary holding companies, and thus involve many questions beyond the scope of the issues in this litigation. Nevertheless, possible recovery on behalf of subsidiaries for payments made under contracts held to be void for violation of the Holding Company Act is one of the elements which must be taken into account in any plan which attempts to be a complete settlement of the equities between Bond and Share and the public security holders of its subsidiaries. Even if plans could be worked out with some provision for adjustments contingent on the ultimate outcome of the pending

[6] See — S. E. C. —; Holding Company Act Release No. 2962 (1941).

[7] See Holding Company Act Release No. 4305.

litigation, the necessity for including such a provision would seriously complicate the problem of arriving at a satisfactory plan. Moreover, piecemeal reorganization is unsatisfactory in its impact on security holders, as well as for administrative reasons. Consequently, it seems inescapable that any material delay in finally determining the issues involved in this litigation will result in substantial if not corresponding delay in bringing about the orderly application of Section 11 (b) to a major segment of the industry.[8]

We urge, therefore, that this Court in considering whether to grant or deny the petition should consider which course is most likely to aid in expeditious termination of the litigation. In this connection we call attention to the fact that the circuit court of appeals, in holding that the complaint states a claim for relief, failed to pass upon the proper measure of damages to be applied in the event that liability should be established at the trial.[9] While we do not doubt that the court below could properly decline at this stage to pass upon that issue, there are reasons, not urged be-

[8] We wish to emphasize that the delay we fear will be occasioned not by any particular outcome to the litigation, but only by failure to bring the litigation to prompt and final determination in favor of one or the other of the parties.

[9] The court said, 142 F. (2d), at 427:

"The rule of damages—whether return of the full consideration, as plaintiff claims, or only the difference between the consideration and the value of the services received—need not be settled now in advance of answer and of trial on the merits."

low by the parties to the action, which we believe make the exercise of such self-restraint inappropriate in this case. The analysis required to determine whether as a matter of law the complaint is sufficient to state a claim for relief would seem to carry with it as a logical concomitant further analysis to determine what kind of relief could legally be awarded if the allegations of the complaint were sustained by the proof. We believe that such a determination could properly be made in advance of trial, and that the settlement of the question *in limine* would be likely to aid materially in shortening the period of the litigation.

Accordingly, we respectfully suggest that if the Court should regard the issues raised by the petition as justifying a grant of certiorari, and should upon consideration of the merits agree with the court below as to the sufficiency of the complaint, the Court should also undertake to decide the issues reserved below with respect to the proper rule of damages to be applied in such a case.[10] While we appreciate that this Court is ordinarily reluctant to decide questions which have not been passed upon by the courts below, this reluctance has been permitted to yield in cases where, as here, considerations of equity and public interest "require that the litigation be brought to an end

[10] If the Court should elect to follow this course, it would seem proper to include in the order granting the petition a direction to the parties to discuss the rule of damages in their briefs and on oral argument.

as quickly as possible." *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 457, 463. *Cf. Gerdes* v. *Lustgarten*, 266 U. S. 321, 327; *Cole* v. *Ralph*, 252 U. S. 286, 290. So extending the scope of review in this case, if review is to be granted at all at this stage of the litigation, would go far to lessen the likelihood of delay which piecemeal review might occasion in the disposition of what is but a single controversy.

Respectfully submitted.

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